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In the Supreme Court of the United States

OCTOBER TERM 1965

No. 710

CONTINENTAL GRAIN COMPANY,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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The business upon which the questioned tax was laid was the unloading of commodities from interstate carriers by petitioner, Continental Grain Company. Receipts from this business were segregated and identified as shown in petitioner's brief pp. 7 and 8. That such business was a necessary incident to the business of operating a public warehouse or any other business is quite irrelevant.

This Court in *Puget Sound Stevedoring Company* v. *State Tax Commission,* 302 U.S. 90 (1937) held that the Washington gross receipts tax could be levied on some

portions of a business activity without constitutional objection while violating the Commerce Clause if levied on that portion of a business consisting of loading and unloading carriers in interstate and foreign commerce.

REPLY TO RESPONDENT'S ARGUMENT

Respondent, while recognizing the validity of *Joseph* v. *Carter and Weekes Stevedoring Co.,* 330 U.S. 422 (1947) and *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U.S. 90 (1937) attempts without any citation of authorities to limit the holding of these cases to situations where those engaged in unloading are employed by the carrier (Resp. Br. p. 8). *Carter & Weekes* certainly does not make any distinction of this nature. *Puget Sound Stevedoring Co.* notes at 302 U.S. 93 that

> "Sometimes the cost (of the unloading) is absorbed by the vessel and sometimes billed as an extra charge to shipper or consignee",

and at 302 U.S. 94

> "The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the state. What is decisive is the nature of the act, not the person of the actor".

The State of Washington could not be too impressed with this pretended distinction since as noted in the footnote at p. 9 Respondent's Brief it allowed Continental Grain Company a deduction for amounts derived from loading grain from terminal warehouses to ships, and of course Continental Grain Company was not employed by the ship.

Carter & Weekes and *Puget Sound Stevedoring Co.* so squarely cover the facts in this petition that if the Washington Supreme Court decision in this case is allowed to stand unquestioned, the numerous state and local jurisdictions levying gross receipts taxes could come to no other conclusion than that the long line of authority culminating in these two cases is no longer good law. Neither would there be any explanation of what this Court deems the present law to be.

The State of Washington argues that the cases of *Canton R. Co.* v. *Rogan*, 340 U.S. 511 (1951) and *Western Maryland R. Co.* v. *Rogan*, 340 U.S. 520 (1951) have determined the question presented to this Court. The Court is very clear in *Canton Railway Co.* that unloading and loading charges are not involved in its decision.

> "Appellant claims that loading and unloading are a part of its activities. But close examination of the record indicates that it merely rents a crane for loading and unloading and does not itself do the stevedoring work. Hence, we need not decide whether loading for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. *Joseph* v. *Carter & Weekes Stevedoring Co.* (citation)." 340 U.S. 515.

In *Western Maryland R. Co.* the Court concluded its opinion:

> "Whether loading and unloading would be exempt is a question we reserve" 340 U.S. 522.

Respondent's brief at page 9 states that unloading of grain from interstate carriers is properly subject to the

gross receipts tax, since "the tax does not discriminate against interstate commerce nor can any other state repeat the tax since the subject of taxation is exclusively local in nature," citing *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U.S. 662 (1949).[1]

Carter & Weekes, the validity of which respondent purports to recognize, states otherwise:

> "Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, these laws may be unconstitutional because they burden or interfere with commerce." 330 U.S. 433.

In *Carter & Weekes,* in a situation similar to that of petitioner, the Court also found that there was in fact a multiple burden on interstate transportation when the gross receipts from stevedoring were subject to tax because of the possibility of a similar tax at the other end of the line.

In *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), this Court distinguished *Carter & Weekes* as a case where a possibility of a multiple burden existed, stating:

> "A tax on an integral part of an interstate movement might be imposed by other states with the net effect of prejudicing or unduly burdening commerce" 366 U.S. 202.

Five years after *Interstate Pipe Line,* this Court eliminated the "multiple burden" test as the critical factor in determining validity of a tax, when in *Michigan Wis-*

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[1] Decided by a 5-4 Court, one member of the majority concurring on the ground that the tax was on intrastate commerce.

consin Pipeline Company v. *Calvert*, 347 U.S. 157 (1954) in a unanimous opinion, it held that it would be sufficient to render a tax unconstitutional if it were on an incident of transportation "not so separate and distinct from interstate transportation as to support the tax", finding as an *additional* objection that a multiple burden would result.

Respondent states that there is no discrimination against interstate commerce in this case.

R.C.W. 82.16.050 (8) (App. A Petitioner's Brief) grants a deduction in computing the gross receipts tax for "amounts derived from transportation of commodities to an export elevator . . . from points of origin in the State . . ." Although respondent (Br. p. 10) without citing any authority asserts that transportation does not include unloading, this Court has stated otherwise on many occasions:

> "The transportation in commerce, at the least begins with loading and ends with unloading," *Carter & Weekes*, 330 U.S. 427, 428 and other cases cited in petitioner's brief, p. 18.

Since the Washington Supreme Court in this case disallowed the deduction with respect to unloading grain received from outside the state and R.C.W. 82.16.050 (8), to be consistent with the decisions of this Court, must allow a deduction with respect to unloading grain received from within the state, there is an obvious discrimination against interstate commerce.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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